1-1-1996

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ARE STATE CONSTITUTIONAL CONVENTIONS THINGS OF THE PAST? THE INCREASING ROLE OF THE CONSTITUTIONAL COMMISSION IN STATE CONSTITUTIONAL CHANGE*

ROBERT F. WILLIAMS**

Increasing use of the constitutional commission as an auxiliary device for initiating both major and minor changes is one of the most significant developments in the procedure of modernizing state constitutions. Constitutional commissions were developed initially, and have been used primarily, as auxiliary staff arms of state legislative assemblies. Their principal function has been to provide expert advice on constitutional problems and issues and to propose and draft amendments, revisions, and even entire constitutions. The 1968 Florida Constitution was the first state organic law to accord constitutional status to the commission as a formal method of proposing constitutional change.

Albert L. Sturm

Interestingly, the research leading to this article grew out of work...
performed for a state constitutional commission. Such appointed commissions and their growing impact on the evolution of state constitutions have not been adequately recognized.\(^2\) Compared to the constitutional convention, that unique, two hundred year-old invention of American political practice, the constitutional commission is of relatively recent vintage. It is only about a century old. In fact, in his 1887 Treatise on Constitutional Conventions, Judge John Alexander Jameson described the constitutional commission as “a novel device.”\(^3\)

Constitutional commissions are “extratextual,” not generally being provided for in state constitutions. Such commissions also are not usually mentioned in the standard list of mechanisms for state constitutional change: elected constitutional convention proposals, amendments and revisions proposed by legislatures, and initiatives proposing state constitutional amendments.\(^4\)

In modern political practice, each of the mechanisms for state
conventional change, except in Delaware,\textsuperscript{5} involves the electorate in an exercise of popular sovereignty. The use of a constitutional convention usually relies on three expressions of popular will: deciding the question whether there should be a convention, electing the delegates, and voting on whether to ratify the convention’s recommendations. With legislatively-proposed amendments, the direct expressions of popular will are cut to one: voting on whether to ratify the legislature’s proposed amendments. In the initiative process for state constitutional amendments, the voters are involved initially not as the electorate, but as petition signers; they vote later on whether to ratify the proposals gaining enough valid signatures to be placed on the ballot. In Florida, with its new Constitutional Revision Commission, the voters are only involved at the final stage of voting on whether to ratify the Commission’s proposals.

Constitutional commissions can and often do play ancillary roles crucial to each of these recognized mechanisms. It may be that the constitutional commission has now overtaken the constitutional convention as the most important source facilitating state constitutional change.\textsuperscript{6}

The need for established processes of change in state constitutions was recognized early, particularly by Thomas Jefferson. Jefferson contended that:

And, lastly, let us provide in our constitution for its revision at stated periods . . . Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it itself, had received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be

\textsuperscript{5} Delaware is the only state that provides for legislative amendment to the state constitution without a vote of the people. \textit{See} Opinion of the Justices, 264 A.2d 342 (Del. 1970).

\textsuperscript{6} This may be a premature conclusion. Almost forty years ago John Bebout observed:

A few years ago many people were saying that the constitutional convention was a thing of the past. There was a fifteen year period between adjournment of the Missouri Constitutional Convention of 1922-23 and the meetings of the New York and New Hampshire conventions in 1938 when no state held such an assembly. The last twenty years, however, have seen a distinct revival of the constitutional convention.

John Bebout, \textit{Recent Constitution Writing}, 35 \textit{Tex. L. Rev.} 1071, 1071 (1957). In any event, constitutional conventions are not now commonly used in the states. \textit{See} Gais and Benjamin, \textit{infra} note 52.
provided by the constitution; so that it may be handed on, with periodic repairs, from generation to generation, to the end of time, if anything human can so long endure.\(^7\)

Evolution of the processes of state constitutional change, particularly the requirement of popular ratification, continued well into the nineteenth century.\(^8\) The evolution is still taking place.

A number of states (now numbering fourteen), like New York, have acted on Jefferson’s view and amended their state constitutions to require a periodic consideration of state constitutional change.\(^9\) Those states, and all the others, also rely on the other methods of change listed above. The commission method has now emerged as the leading mechanism for stimulating state constitutional change. Any careful study of the processes of state constitutional change cannot, therefore, ignore the role of constitutional commissions.

Since Jameson wrote, at least four distinct permutations of the constitutional commission have evolved, with very different functions and effects. Commissions have been used: 1) in conjunction with constitutional conventions, either to help implement their work after a failure at the polls, or through background study and analysis to lay the groundwork for such conventions; 2) as devices for assisting legislatures in avoiding conventions, and thus retaining control of constitutional change; 3) to work together with the legislative branch in studying and recommending state constitutional change; and finally, 4) they have begun, in Florida, to develop as a method for generating and directly recommending constitutional amendments to the people, bypassing both the legislature and the convention.

State constitutional commissions can be created and funded in a

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variety of ways, and be directed to report to different officials.\textsuperscript{10} Creation by statute requires assent of both the legislative and the executive, and usually assures legislative funding. Creation by legislative resolution accomplishes the task by involving only a single branch. In both of these instances, the report is usually to be submitted to the legislature. Constitutional commissions should be distinguished from joint legislative study committees and task forces, which are internal to the legislative branch.\textsuperscript{11}

Constitutional commissions can also be created by the governor either by executive order or by less formal means, and required to report to her. Because this method does not involve the legislature, funding cannot necessarily be assumed. In Mississippi, the governor appointed a constitutional commission, whose report was to be submitted to him, without issuing an executive order, apparently to provide for a less formal body.\textsuperscript{12} In Oklahoma, private funds were raised to support a governor's constitutional commission when the legislature refused to fund it.\textsuperscript{13}

Because of the indirect route taken by constitutional changes proposed by commissions, debates and reports of such commissions arguably do not qualify as "constitutional history" in the direct sense that the debates in a constitutional convention, or in the legislature on proposed amendments, would be considered evidence of the "intent of the framers." Technically, and legally, of course, the appointed members of a constitutional commission are not the "framers" of ratified amendments that are based on their recommendations. They are not "representatives."\textsuperscript{14} But this is too narrow a view of constitutional history. The commission members operate under a direct delegation of power from either the legislature or the governor. Their recommendations form the origins of important state constitutional changes. Of course, neither the legislature nor a constitutional convention is bound to accept the commission's recommendations, nor even to limit their consideration only to those recommendations forwarded by the commission. The

\textsuperscript{10} See \textit{Sturm}, infra note 78.

\textsuperscript{11} Rich, infra note 35, at 88; Dodd, infra note 72 at 263. Such direct legislative bodies are a very important source of recommended state constitutional changes.

\textsuperscript{12} Southwick, et. al., infra note 35, at 27-28.

\textsuperscript{13} See infra note 40; May, infra note 80, at 23.

\textsuperscript{14} Robert S. Friedman and Sybil L. Stokes, \textit{The Role of Constitution - Maker as Representative}, 9 \textit{Midwest J. Pol. Sci.} 148 (1965), reprinted in JOSEPH F. ZIMMERMAN, infra note 47, at 76; Harvey v. Ridgeway, 450 S.W.2d 281, 288 (Ark. 1970) (Legislator may serve as constitutional convention delegate.)
legislature or convention is neither limited by, nor to, such recommendations. Still, courts routinely rely on the materials prepared by state constitutional commissions.\textsuperscript{15}

So, this form of commission-generated constitutional history, even if not technically of a quality to be considered evidence of "intent of the framers," or without questions about its accuracy or completeness, is still of great importance to scholars, students, judges, government officials, lawyers, historians and political scientists. It is an important part of state constitutional history.\textsuperscript{16} Many of the reports and recommendations of state constitutional commissions are relatively readily available on microfiche,\textsuperscript{17} or in many libraries.

I. PREPARING FOR A CONVENTION OR ADVISING THE LEGISLATURE:

\textbf{NEW YORK AND NEW JERSEY}

The appointed constitutional commission is not specified in any state constitution except for that of Florida. Its unique Constitution Revision Commission can submit its proposals directly to the voters and is discussed in detail below.\textsuperscript{18} Utah has utilized an ongoing, statutory constitutional revision commission which makes recommendations to the legislature, also discussed below.\textsuperscript{19}

The idea to use a constitutional commission seems to have originated in earnest in New York, with the 1872 Constitutional Commission, recommended by the governor and appointed by the legislature.\textsuperscript{20} New Jersey had utilized, albeit unsuccessfully, small,

\begin{enumerate}
\item See G. Alan Tar, \textit{Constitutional Theory and State Constitutional Interpretation}, 22 \textit{RUTGERS L.J.} 841, 852 (1991) ("The more recent the constitutional provision, the more likely that there is an extensive documentary record — pre-convention studies... bearing on its meaning.").
\item See notes 53-55, infra, and accompanying text.
\item \textit{JAMESON, supra} note 3, at 570.
\end{enumerate}
limited state constitutional commissions to study the judicial and executive articles of the constitution in 1852 and 1854. Peter Galie, a leading authority on the history and development of the New York constitution, describes the 1872 Commission as "... an innovation in the state's constitutional history, which seemed to fill a gap between a cumbersome convention and the ad hoc legislative amending process. This method allowed distinguished and informed individuals to recommend constitutional change to the legislature and then to the people."22

The 1872 Constitutional Commission in New York was able to revive and recommend some of the ideas (such as a longer gubernatorial term and the item veto) from the proposed constitution that failed at the polls in 1867. After the Commission’s proposals were approved by the legislature, the people ratified them.23

In 1873, New Jersey seemingly emulated the New York commission idea. The legislature there, after refusing to pass legislation calling for a constitutional convention to revise the outmoded 1844 constitution, provided for the establishment of a constitutional commission on terms very similar to New York’s 1872 statute.24 This was surely one of the most successful constitutional commissions in history: the New Jersey legislature (after extensive and lengthy debate of its own) submitted twenty-eight of the amendments recommended by the commission, all of which were approved by the voters in 1875.25

There is much more of importance about the 1873 Constitutional Commission, though, than just the twenty-eight amendments that were ultimately adopted by the voters. First, there was extensive debate about state constitutional changes that did not lead to final recommendations

21. Wheeler, infra note 79, at 57; Connors, infra note 30, at 10; Rich, infra note 35, at 18 (Rich reports that the commissions each consisted of three persons).
23. Id. at 15. See also Lewis B. Kaden, The People: No! Some Observations on the 1967 New York Constitutional Convention, 5 HARV. J. LEGIS. 343, 364 (1968). Michigan reflected a similar pattern: after the defeat of the 1867 Michigan Constitutional Convention's proposals, a constitutional commission was created in 1873. JAMESON, supra note 3, at 570. Jameson reported that the Michigan Commission, consisting of eighteen members, met for seven weeks, and "recommended a large number of amendments, which upon submission to the people, were all rejected." Id. at 571-72.
25. Id. Interestingly, a number of scholars have missed this important commission. See, e.g., JAMESON, supra note 3, at 570; White, infra note 35, at 1148.
to the Legislature. There were amendments debated by the Commission and recommended to the Legislature which were submitted to the voters only after legislative modifications. Finally, not all of the amendments recommended by the Commission were ultimately submitted by the Legislature to the voters in 1875.

Even looking just at the twenty-eight amendments which survived the triple hurdles of final Commission proposal, legislative acceptance and recommendation, and ratification by the voters, the impact of the 1873 Commission’s work has indeed been great. As John Bebout noted over fifty years ago, the “1875 amendments necessarily entailed a tremendous increase in judicial review of legislation. Since 1875 over half of the more than 300 legislative acts invalidated by the courts were nullified because of the 1875 amendments.”

The mechanism of an appointed commission to study and recommend to the legislature changes in the state constitution was, as in New York, not authorized in the New Jersey Constitution. In this sense, these commissions were “extra-constitutional.”

Still, the 1873 Constitutional Commission, unlike earlier and later New Jersey constitutional commissions, was not a “limited” commission. It was authorized, and in fact did, explore, debate, and entertain proposed amendments to the entire state constitution. The period of 1873-75, which includes not only the Commission’s deliberations, but also the Legislatures’s lengthy consideration of its recommendations and the referendum on the Legislature’s twenty-eight proposed amendments in 1875, “stands behind only three others in significance for state constitutional development in New Jersey: 1776, 1844, and 1947.”

New Jersey’s experience with commissions at the turn of the century proved much less effective. The reports of the 1894 and 1905 commissions were sent to the legislature and went no further. As Charles Erdman observed, on these occasions the legislature “lacked the courtesy of acting on the report by so much as ‘referring it to committee’ for appropriate burial. In short, the appointment of a constitutional

27. WILLIAMS, supra note 24, at 10.
31. ROBERT F. WILLIAMS, supra note 24, at 10.
commission can be viewed as a legislative side-step to avoid rather than to facilitate constitutional revision.\textsuperscript{32}

Later, in the 1940s, the use of a legislatively-created constitutional commission (again as an alternative to a constitutional convention) laid the groundwork, politically and substantively, for the New Jersey Constitution of 1947. After the people rejected a combined commission-joint legislative committee revised constitution at the polls in 1944, a consensus developed leading to the highly successful 1947 Constitutional Convention.\textsuperscript{33}

The constitutional commissions came into being in New York and New Jersey based on the justifications of efficiency and expertise, neither of which were regarded, according to Galie’s analysis, as attributes of the constitutional convention (“cumbersome”) or the legislative amendment process (“ad hoc”). The commission, under these circumstances, served as a research and study group (expertise) and as a technique for agenda-setting in the legislature (efficiency).

But despite these similarities in the New York and New Jersey experience, there seem to have been additional motivations in the use of the commission method in the second case. In New York, the constitutional commission followed a constitutional convention. In New Jersey, by contrast, the commission was a substitute for a convention. Legislation introduced in the same session called for a convention, and gained substantial support. The commission method appears to have been used to diffuse popular pressure on the legislature to call a constitutional convention, and as a response to fears about the outcome of a convention. The commission mechanism, therefore, retained control for the legislature over the final recommendations to the voters.\textsuperscript{34} As noted, most commentators on constitutional commissions have emphasized only the efficiency and expertise rationales.\textsuperscript{35} But in New Jersey neither was

\textsuperscript{32} CHARLES R. ERDMAN, JR., THE NEW JERSEY CONSTITUTION — A BARRIER TO GOVERNMENTAL EFFICIENCY AND ECONOMY 16 (1934).

\textsuperscript{33} John P. Keith, Recent Constitutional Conventions in the Older States, in W. BROOKE GRAVES, infra note 35, at 38, 44-45; RICHARD J. CONNORS, supra note 30, at 30-61; ROBERT F. WILLIAMS, supra note 24, at 13-14.

\textsuperscript{34} WILLIAMS, supra note 24, at 9.

central. Rather the commission was a means for legislative control of the process of state constitutional change, in the face of rising popular and gubernatorial pressure for such change. The technique of retaining legislative control through the use of the commission method for constitutional revision was later noted by such scholars as Albert Sturm\textsuperscript{36} and James Henretta. Henretta recently made the following criticisms:

In many other states, such as Georgia in the 1940's and Kentucky and California in the 1960's, legislatures dispensed completely with a constitutional convention. To meet the pressing need for the reform of outmoded constitutional structures, the legislatures appointed commissions to consider revisions and to report their recommendations. These commissions were not democratic bodies responsible to the people. Their proposals came before the voters only after being carefully reviewed and revised by legislators, governors, and other state officials.

* * * *

Whatever the gloss . . . the commission revision process . . . represented a diminution of activist popular sovereignty. In a carefully calculated fashion, these maneuvers removed power from the hands of the citizenry. The result was a constitution revised as much through administrative procedures as through constitutional debate and political compromise.\textsuperscript{37}

These kinds of criticisms, however, focus on a certain type of constitutional commission — the one that is created to make recommendations to the legislature. As W. Brooke Graves noted, constitutional commissions have come to be widely "used for a variety of reasons, and in many different ways.\textsuperscript{38} New York's experience bears out this observation, as will be discussed presently. Graves went on to describe

\begin{footnotes}
36. Albert L. Sturm, The Development of American State Constitutions, 12 PUBLIUS: THE JOURNAL OF FEDERALISM 57, 84 (1982) ("The mounting popularity of constitutional commissions is attributable mainly to their general acceptability to state legislators who prefer to rely on bodies over whose proposals they have control.").


\end{footnotes}
a different kind of constitutional commission:

Public demand for change is essential before the cumbersome machinery of revision can be put in motion. Such a demand can be developed only by means of a campaign of education, and this in turn, can be effectively conducted only after a great deal of preparatory work has been done.

The usual procedure is to establish a study commission which can serve the two-fold purpose of providing factual information for the campaign — information which can be used again later when and if the campaign succeeds in bringing a constitutional convention into existence. Such a commission can be appointed by the governor on his own initiative, or as a result of legislative action, authorizing and directing that such a commission be established. Or it can come about under private initiative, and be privately financed. This procedure is sometimes necessary when the legislature refuses or at least fails to provide the necessary funds.39

This use of the constitutional commission, as an adjunct to the constitutional convention rather than to the legislature, seems to answer Dr. Henretta's criticism, and to aid rather than impede the exercise of popular sovereignty.40

II. NEW YORK EXPERIENCE

The experience of New York with constitutional commissions is representative of that in other states. In New York, since 1872, constitutional commissions have, as Graves noted in a wider context, been "used for a variety of reasons, and in many different ways."41 Some were appointed by the governor; others were established by the legislature. Some were created in anticipation of a vote on the mandato-

39. Id. at 3-4. See also Elmer E. Cornwell, Jr., Jay S. Goodman & Wayne R. Swanson, STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES 10-12 (1975).

40. A constitutional commission was recently used in Oklahoma to develop and recommend initiative petitions seeking state constitutional change. In In re Initiative Petition No. 344, 797 P.2d 326 (Okla. 1990), and In re Initiative Petition No. 342, 797 P.2d 331 (Okla. 1990) the Oklahoma Supreme Court struck from the ballot initiatives developed by the commission that would have revised articles of the Oklahoma Constitution. The court based its decisions on the single-subject rule. See Robert H. Henry, The Oklahoma Constitutional Revision Commission: A Call to Arms or the Sounding of Retreat?, 17 Okla. City U.L. REV. 177 (1992); Dennis W. Arrow, Representa-tive Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition, 17 Okla. City U.L. REV. 3, 66-86 (1992).

41. Graves, supra note 38, at 9.
ry convention question; others resulted from the need to prepare quickly after the question passed. The 1915 and 1938 conventions — one that produced a constitution rejected at the polls, the other that resulted in the adoption of major revisions — produced bodies of research that influenced state government's development for decades after.

A second New York commission was established in 1875 by Governor Samuel J. Tilden. Only one of its proposals, on debt limits, was recommended by the legislature and approved by the voters. But the work of the 1872 and 1875 constitutional commissions helped lay "the ground work for many of the reforms adopted at the 1894 convention." 42

An 1890 commission created by the legislature returned to it with recommendations concerning the judiciary. These were laid aside when the election of a governor and legislature of the same party broke a political deadlock and resulted in the calling of a constitutional convention in 1894 that was authorized at the polls in 1887. 43

The 1915 Constitutional Convention was authorized by a narrow majority in a very low turnout special election on April 7, 1914, with delegates to be elected at the general election in that same year. Following this vote the legislature created a five-person commission "to collect, compile and print information and data for the Constitutional Convention of 1915." 44 This commission contracted with the Bureau of Municipal Research in New York City for what proved to be the most extensive set of studies of state government done to that date.

A commission considered the judiciary again in 1921. A number of its proposals (adapted from the failed 1915 proposals) were recommended by the legislature and approved by the voters. 45

After the people authorized a constitutional convention when the mandatory question was asked in 1936, Governor Herbert Lehman appointed a committee to prepare background materials for delegates. Chaired by Charles Poletti, who later became Lieutenant Governor, the New York State Constitutional Convention Committee produced a body of work extraordinary for its depth, breadth and quality.

In 1956, in preparation for the 1957 vote on whether to hold a constitutional convention, the legislature established a Temporary Commission on the Constitutional Convention. This commission, chaired

42. Galie, supra note 22, at 16.
43. Id. at 17.
44. Laws of 1914, Chapter 261.
by Nelson Rockefeller (who later became governor) held public hearings and developed background material. It actually remained in existence after the voters rejected the convention, under the name Special Committee on the Revision and Simplification of the Constitution. It published a number of state constitutional reports before going out of existence in 1961. Some of these provided the basis for amendments later proposed through the legislature and adopted by the people.

After the New York voters approved the call of a constitutional convention in 1965, the legislature created a Temporary Commission on the Constitutional Convention. Dr. Galie reports that this commission was “plagued by partisan divisions,” and had little impact on the convention. No commission was appointed in preparation for the mandatory convention question in 1977, which was defeated at the polls by a substantial margin.

In May, 1993, Governor Mario Cuomo promulgated an executive order establishing a Temporary Commission on Constitutional Revision to make preparations for the 1997 referendum on whether to call a constitutional convention.

New York’s most recent commission is different from all the others. As its report notes:

Although New York has had many constitutional revision commissions throughout its history, most were created either after a referendum vote or after the Legislature voted to place a convention call on the ballot. In contrast, this Commission was created four and a half years in advance of the constitutionally required referendum vote. Unlike preceding commissions, it was established not to serve potential delegates, but to inform the people at large about the constitutional change process and to advise the Governor and Legislature about how best to prepare for the possibility that a convention might in fact be

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46. Id. at 27-28.
47. Id. at 28-29. For a summary of this commission’s recommendations, see Alternative Methods of Simplification, in JOSEPH F. ZIMMERMAN, SUBNATIONAL POLITICS: READINGS IN STATE AND LOCAL GOVERNMENT 71 (2d ed. 1970). The commission suggested the interesting idea of the “two-part constitution,” where fundamental provisions on rights and governmental structure would be amendable only by the existing methods of state constitutional change, but other, less important regulatory details could be changed by a statute enacted by two successive legislatures and two gubernatorial approvals. Id. at 72-75.
The 1993-95 Commission had issued several interim reports concerning the processes of state constitutional revision, substantive matters, and several crucial voting rights and apportionment matters surrounding a constitutional convention. In its February, 1995 Final Report the Commission identified four crucial areas (the state budget process, state-local relations, education and public safety) that were in need of reform, including the possibility of state constitutional change. The Commission recommended the creation of “action panels,” modeled on the National Commission on Social Security Reform and the federal base closing commission, which would address each of the four areas and make recommendations that the governor and the legislature would commit ahead of time to consider seriously. In the absence of serious consideration, and some meaningful reform, the Commission would recommend a positive vote on whether a constitutional convention should be called in 1997. This is a unique approach to the problem of state constitutional revision in an atmosphere where many people are worried about the outcome of an unlimited state constitutional convention. This is a new technique of using the periodic referendum on calling a state constitutional convention to pressure the executive and legislature to accomplish substantial reform prior to the referendum.

The current New York Temporary Commission on State Constitutional Revision has a long, varied history behind it. Whatever the political context for its creation, the work of many of its predecessor commissions has had considerable impact on government in the state, either immediately or in the decades that followed their deliberations and recommendations.

III. **Utah's Permanent Commission**

A Utah law adopted in 1969 created a *permanent* sixteen-member Constitution Revision Study Commission with heavy representation from...

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the legislature. Commission members serve six-year terms. Three are appointed by the governor and three each by the speaker of the House and the president of the Senate from their respective bodies, with a requirement of bipartisanship. These nine then appoint an additional six. The legislative research director serves ex-officio. The commission selects its own chair.

The Utah commission is authorized by law both to undertake its own initiatives and to consider recommendations from state leaders and “responsible segments of the public.” But it may not make proposals directly to the people for constitutional change. Its duties are “. . . to make a comprehensive examination of the Constitution of the State of Utah, and of the amendments thereto, and thereafter to make recommendations to the governor and the legislature as to specific proposed constitutional amendments designed to carry out the commission’s recommendations for changes in the constitution.”

Three of the Commission’s revised articles were referred by the legislature to the voters and approved in 1992.

IV. FLORIDA’S CONSTITUTIONALLY BASED COMMISSION: THE NEWEST ALTERNATIVE METHOD FOR CONSTITUTIONAL CHANGE

In Florida, as earlier noted, the 1968 Constitution provided for an automatic, periodic review of the state constitution at regular intervals. Article XI, Section 2 provided that ten years after adoption of the constitution, and every twenty years thereafter, an appointed constitution revision commission would be created. This commission was empowered to submit its recommended amendments or revisions directly to the electorate, a mechanism of state constitutional revision which was, at the time, unique to American constitutional history.

After adoption of the 1968 Florida Constitution, the ten years set for automatic review went by very quickly. The 1977-78 Florida Constitu-

53. Chapter 54, Section 63-1, Laws of Utah. This seems to be the adoption of W. Brooke Graves’ suggestion of “continuous revision” of state constitutions. See W. Brooke Graves, Current Trends in State Constitutional Revision, 40 Neb. L. Rev. 560, 565-58 (1961). A similar recommendation has been made in Alaska. See Janice C. May, supra note 9, at 5-6.


55. May, supra note 9, at 5.

tion Revision Commission proceeded to engage in a very open, far-reaching examination of the state constitution, and proposals for its change. Its proceedings were extraordinarily well documented.57

The Commission ultimately made important and well considered recommendations for change in the state constitution to Florida's voters.58 All of the recommendations, however, were rejected.59 Albert Sturm opined that the defeat resulted from the review coming too soon after the comprehensive 1968 revision, without a popular call for change, and from the presence on the ballot of another, controversial measure on casino gambling.60

On the surface, defeat of the 1978 proposed revisions in Florida seems to be a great state constitutional revision failure. Constitutional Revision Commission Chairman Sandy D’Alemberte, together with others, takes a longer view of the failed 1978 revisions:

The immediate contribution of the commission was less than historic, for its sweeping proposals (including abolition of the cabinet) were lost when presented on a ballot alongside a very unpopular proposal for casino gambling, which was placed there through the initiative process. Although the commission’s work was rejected by the voters, a great deal of the agenda for further amendment of the constitution was shaped by the Constitution Revision Commission. As Steve Uhlfelder, executive director of the commission, has observed, in the years following the commission, the legislature proposed and the voters approved proposals in substantially the same format as those developed by the commission. These included amendments adding a right of privacy to the Declaration of Rights (adopted 1980), extending impeachment to county judges (1988), providing uniform rules for the judicial nominating commissions (1984), extending the widows' exemption to widowers (1988), allowing the legislature to classify inventory for property tax purposes (1980), and providing various changes in the bonding power (1980, 1984).61

59. D’ALEMBERTE, supra note 56, at 15.
60. STURM, supra note 36, at 85.
61. D’ALEMBERTE, supra note 56, at 15. See also Steven J. Uhlfelder and Robert A. McNeely, The 1978 Constitution Revision Commission: Florida's Blueprint for Change, 18 NOVA L. REV. 1489 (1994). A similar phenomenon was documented in Minnesota after the 1947-48 Constitutional Commission. See G. Theodore Mitau, Constitutional Change by Amendment:
This commission method of revision has stirred controversy, but Florida voters rejected a legislative proposal in 1980 to abolish the periodic commissions. In fact, in 1988 the voters approved the same mechanism for the Tax and Budget Reform Commission. That commission, organized every ten years, recently exercised its powers to propose, inter alia, a budget reform amendment that was adopted by the electorat at the November, 1992 election, overruling a holding restricting the governor's budget powers. In this way, the unique Florida commission mechanism has been applied to the specialized, and often intractable, fiscal questions involved in state and local government. On the other hand, the new, specialized commission has been criticized as usurping the more general authority of the periodic, 20-year commissions, and as possibly even eliminating fiscal matters from the authority of the general commission. Currently, preparations are under way for the 1997 Florida Constitution Revision Commission.

V. CALIFORNIA'S CONSTITUTION REVISION COMMISSION

In 1993 the California Legislature created, and funded, the California Constitution Revision Commission. The governor had


62. Id. at 15.

The sooner people start thinking about this opportunity, the better the process will work. Because people do not change their constitutions lightly, the people of Florida must come to understand the revision commission process and must be prepared to consider the kind of fundamental changes that may result from the process, if constitutional revision is to succeed. That means that first, the nature of the process itself must be made clear.

See also Thomas C. Marks, Jr. and Alfred A. Colby, Some Proposed Changes to the Florida Constitution, 18 NOVA L. REV. 1519 (1994).
vetoed several earlier attempts to create a commission. The twenty-three member Commission is to operate until the end of 1996, and has a broad mandate, with a focus on budgetary matters. The Commission has prepared preliminary recommendations, is publishing a newsletter, and is conducting public hearings and video conferences around the state. It will be very interesting to many people interested in state constitutions to see what the Commission recommends and what action the Legislature takes on the recommendations.

VI. INCREASING RELIANCE ON STATE CONSTITUTIONAL COMMISSIONS

After Jameson's inclusion of the "novel device" of the constitutional commission in his treatise on constitutional conventions, other scholars also began to take notice. In 1910 Walter F. Dodd noted the early (unsuccessful) use of commissions in New Jersey (1852 and 1854), as well as the New York experience and that in a number of other states. Dodd, echoing a point made by Jameson in his treatise, noted:

By seeking advice the legislature confesses its incompetency to act, and

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67. May, supra note 9, at 6.
68. Id. See also Janice C. May, State Constitutions and Constitutional Revision, 1992-93, 30 THE BOOK OF THE STATES 2, 6 (1994)
69. See CALIFORNIA CONSTITUTION REVISION COMMISSION, CCRC NEWS 2-5 (Sept. 1995). The Commission will soon publish a preliminary report. Among the Commission's preliminary recommendations were eliminating a number of statewide elected executive officers, a unicameral legislature with shorter sessions, authorization for privatization of public services, modification of the initiative process, a constitutionally-mandated balanced, two-year budget, reform of public school governance and financing, revision of the state-local governmental relationship, limitations on state mandates to local government, and strengthening local home rule. Id. These are extremely important recommendations, of national importance.

At its February, 1996 meetings, the Commission adopted all of its preliminary recommendations, except the unicameral legislature proposal, which it rejected. CALIFORNIA CONSTITUTION REVISION COMMISSION, CCRC NEWS 2-5 (Mar. 1966).
70. See CALIFORNIA CONSTITUTION REVISION COMMISSION, infra note 103.
71. Id.
advice is useless in such a case because the legislature has discretion to accept it wholly or in part, or to reject it. Stated in this way Judge Jameson's objection seems hardly to require an answer. The constitutional commission is useful under proper limitations as an adviser of the legislative bodies...73

In 1915 James Q. Dealey also discussed state constitutional commissions. "New England has been rather partial to the use of constitutional commissions instead of conventions, and three states have made experiments of this sort."74 He briefly described the Maine (1875), Rhode Island (1897) and Vermont (1908) experiences with commissions.75

Extensive consideration of the roles of commissions in the processes of state constitutional revision, both as to quantity and quality, did not come until the work of Bennett Rich76 and Albert Sturm.77 Others have recognized the contributions of these two scholars to our understanding of state constitutional commissions.78 For example, W. Brooke Graves observed in 1966:

73. Id. at 265. For Jameson's similar criticism, see supra note 3, at 574.
74. JAMES Q. DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS 249 (1915, 1972 Da Capo Reprint).
75. Id. at 249-50. See also id. at 101-02 (describing the Rhode Island experience). On the 1875 Maine Constitutional Commission, see MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE 7-8 (1992).

It is unlikely that Dealey would have approved of the use of constitutional commissions. James Henretta noted:

Both a work of academic scholarship and a progressive political tract, Dealey's book celebrated the newly enhanced power of the electorate to exercise its legal sovereignty "through the constitutional initiative and referendum" as well as through the constitutional convention, "the great agency through which democracy finds expression."

Henretta, supra note 37, at 829. Dealey did characterize the report of the 1897 Rhode Island commission as "conservative to the last degree." Id. at 102, and the New England Commissions as "strongly conservative." Id. at 250.
78. See, e.g., Graves, supra note 38, at 10; see also Nunn, supra note 2 at 317 (recognizing Sturm's work).
Although many advantages are claimed for the commission device, it also has important disadvantages. Its advantages are reputed to be that, being a small and prestigious body with a specific and important task to perform in a limited time, it can attract the most able men. It is far less costly than a convention. Most important of all, in the eyes of many it can be used as a substitute for a convention. Professors Rich and Sturm are among the most careful students of the commission device. The former notes that few of these bodies measure up to expectations, that the members are subject to the same prejudices and political pressures as are the members of a legislature or a convention, and that they have “one inherent and fatal weakness in that their every act is measured in terms of what they believe the legislature will accept.” The fact that they must report to the legislature may in itself constitute an almost insurmountable barrier to thoroughgoing revision. 79

Janice May has carried on the work started by Albert Sturm. 80

In 1966 Sturm and James B. Craig, Jr. noted the increase in the use of constitutional commissions, 81 observed earlier by Rich. They reported the creation of thirty-eight commissions between 1950 and 1965, with a sharp upturn between 1960 to 1965. 82 They concluded:

The crux of the matter is ultimate legislative control. Legislative bodies are jealous of their constitutional amendment and revision prerogative. When they are presented with an alternative that enables them to preserve this prerogative, in contrast with one, such as the constitutional convention, over which their powers are far more limited, the choice is obvious to most lawmakers. Recent experience points to the continued use of constitutional commissions as staff arms of legislative assemblies in general constitutional reform efforts. Only in states where general public interest is relatively high, and where there is heavy pressure from powerful interest groups—conditions that commonly result only from some major emergency—is the theoretically

82. Id. at 57-58.
more democratic method of the constitutional convention likely to be chosen for general revision or the writing of a new constitution.\textsuperscript{83}

In 1970 Sturm published the most definitive study of state constitutional commissions to date, for the National Municipal League. His \textit{Thirty Years of State Constitution-Making: 1938-1968} included major consideration of commissions and extended his research back to 1938.\textsuperscript{84} He reported the creation of sixty-two constitutional commissions in thirty-five states between 1939 and 1968,\textsuperscript{85} included detailed information on all of them,\textsuperscript{86} and noted the "increasing popularity of this device."\textsuperscript{87} Twenty-two commissions had been formed in the four years since his earlier data (1965-1968).\textsuperscript{88}

Then, in 1982, Sturm, together with Janice May, published data on state constitutional commissions reaching back to 1930.\textsuperscript{89} They reported that during the decade of the 1970s "constitutional commissions wrote the initial drafts of all revised constitutions proposed to state electorates by legislatures."\textsuperscript{90} Although noting that the increased use of commissions "has been one of the significant developments in the procedure of state constitutional revision during the past 30 years . . . . .", they also noted that in 1980-81 "fewer state constitutional commissions or committees operated than in any biennium of the 1970s."\textsuperscript{91}

In 1990 Janice May reported that during the decade of the 1980s there were only nine commissions created.\textsuperscript{92} But for the 1992-93 period, she reported that commissions operated in four states and one was authorized by statute in another state.\textsuperscript{93}

\begin{itemize}
  \item \textsuperscript{83} Id. at 63.
  \item \textsuperscript{85} Id. at 34.
  \item \textsuperscript{86} Id. at 35-36; 138-55.
  \item \textsuperscript{87} Id. at 37.
  \item \textsuperscript{88} Id.
  \item \textsuperscript{90} Id. 124.
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} May, supra note 80, at 23. \textit{See also} Gais and Benjamin, supra note 52, at 1303.
  \item \textsuperscript{93} May, supra note 9, at 5.
\end{itemize}
VII. **Judicial Response to Constitutional Commissions**

Because of the extratextual nature of constitutional commissions, it is not surprising that their use in the process of state constitutional change has been challenged in the courts. These challenges, however, have generally failed under circumstances where commissions were utilized in conjunction with constitutionally established methods of changing the constitution. Georgia, Georgia, Kentucky, Idaho, and Virginia have upheld the practice. Alabama, however, refused to permit it in a case raising other related problems, disagreeing directly with Georgia and Kentucky. Arkansas struck down an attempt by the legislature to authorize a limited, appointed constitutional "convention." This general, albeit not unanimous, judicial endorsement of the commission method, used in conjunction with the established, formal mechanisms of state constitutional change will likely contribute to its increasing use.

VIII. **Conclusion**

Constitutional commissions have made substantial contributions around the country. Commissions have operated to set the agenda for state constitutional revision both in the short run, in the legislative session to which they report, but also sometimes for years to come. The

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95. Gatewood v. Matthews, 403 S.W.2d 716 (Ky. 1966). The decision in *Gatewood* was criticized in *Comment*, 81 HARV. L. REV. 693, 695 (1968) on the grounds that it "has the effect of significantly increasing the legislature's power to initiate and control the process of constitutional revision. In fact, the legislature alone decided to have a new constitution drafted." The people of Kentucky had rejected a convention call in 1960. *Id.* at 693. For a detailed analysis of the processes in Kentucky leading to the *Gatewood* decision, see Paul Oberst and J. Kenderick Wells III, *Constitutional Reform in Kentucky — The 1966 Proposal*, 55 KY. L. J. 50 (1966).
most influential political figures in the state have often served on state constitutional commissions.

Their rate of use seems to have overtaken that of the state constitutional convention, but also to be linked to the rate of state constitutional revision generally. Constitutional commissions, like constitutional conventions (although somewhat less directly), operate within, and as part of, the ongoing political processes of the states. The recent experience in Florida demonstrates that they may also provide a fourth means to propose constitutional change directly to the people, in addition to the convention, the legislative route, or (where it exists) the initiative process. But, as Bennett M. Rich observed over thirty years ago, "the commission device is no substitute for a convention. No amount of wishing can make it so." 

Although there is a certain amount of myth to the notion of constitutional conventions, they remain the foremost outlet for "activist popular sovereignty." Serving as an adjunct to a conven-

100. ELMER E. CORNWELL, JR., et. al., supra note 39, at 33-38, 192. For an excellent new analysis of the political forces in state constitutional revision, see CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS (G. Alan Tarr, ed., 1996).
102. Harvey Walker, Myth and Reality in State Constitutional Change, in GRAVES, supra note 35 at 3, 15:

Mythologically, it is the personification of the sovereign people assembled for the discharge of the solemn duty of framing their fundamental law. It is supposed to be above politics and to have no peers among governmental agencies. Yet, experience has shown that the convention rarely rises above the legislature in the quality and experience of its membership and that pressure groups and political parties have significant influence upon its deliberations. The cost of convening and holding a constitutional convention has become practically prohibitive.

Many states in recent years have turned from conventions to constitutional commissions that consist of experts who report to the governor and legislature and whose handiwork is submitted for popular vote, if approved by these political organs of the government. The saving in time and expense and the gain in the quality of the work done should commend this new American institutional device to constitution-framers as a replacement for the constitutional convention. (Footnote omitted.)

But see generally, ELMER E. CORNWELL, JR., et. al., supra note 39.
103. Henretta, supra note 37. Janice May has observed, however, that commissions can act to increase citizen input into the revision process through public hearings and even teleconferencing, recently used by a legislative task force in Alaska. May, supra note 9, at 5. Teleconferencing is also being used by the current California Constitution Revision Commission. CALIFORNIA CONSTITUTION REVISION COMMISSION, CCRC NEWS 1, 3 (Oct. 1995).
tion, however, complementing its exercise of popular sovereignty, rather than just a substitute for it, the commission can be a very important positive component of state constitutional change. Further, as concerns about the uncertain outcomes of constitutional conventions continue to multiply, together with the dangers of the undeliberative initiative process, the commission mechanism may be the only realistic alternative for needed, and reasoned, state constitutional change. These commissions may not fit Jefferson's vision of the process by which each generation would give voice to its preferences, but they may be all we have. State constitutions, by the political theory of Jefferson and others, by their design, and by necessity, need mechanisms of change. As Kermit Hall observed:

Most state constitutions have also been remarkably pliable, a quality essential to their function of filling the vacant spaces of the federal document . . . . There have been 239 separate constitutional conventions, and since the beginning of the republic there has never been a three-year period in which at least one state constitutional convention or, more recently a constitutional revision commission has not met.105

Many important questions remain. What factors contributed to the rise of the use of state constitutional commissions? One obvious motivation was the legislative desire to maintain control over the agenda of state constitutional change, although legislatures have not always succeeded in achieving this goal. Prominently within this larger motivation was the desire to avoid convention-mandated reapportionment, a development that, when finally ordered by the United States Supreme Court, opened the way for the explosion in state constitutional revision

104. Gais and Benjamin, supra note 52.

in the 1960s and 1970s. Another motivation may have been an attempt to avoid the abuses of the dominant political parties.

Constitutional commissions were likely one of the manifestations of the broader Progressive, and later "managerial," views of government. Reliance on scientific expertise and concerns for efficiency, as opposed to the prior party politics and citizen (voter) involvement, lead to a broad adoption of the commission mechanism throughout the federal, state and local governments. The use of state constitutional commissions thus fits nicely into this larger political and societal development. Possibly, though, now they have developed a momentum of their own.

How effective have commissions actually been in attracting expertise and bringing it to bear on state constitutional issues? Do the appointees actually possess better qualifications than delegates elected to constitutional conventions? Is one type of commission more successful than others? How do we measure the success of state constitutional commissions, or conventions, for that matter? Are commissions utilized more in states without the constitutional initiative, or more for amendments rather than wholesale revisions?

These are all fair, important, and to a great extent, unexplored questions about the use of state constitutional commissions. Many of these questions were asked by colleagues reviewing drafts of this article. A further exploration of these and related questions, however, is beyond the scope of this preliminary article. Such questions do underscore the need for further study (including comparative investigation), analysis

106. Alan Tarr reminded me of this point. See also, Sturm, supra note 36, at 72-73.
107. I am indebted to John Kincaid for the suggestions forming the basis of this paragraph. Cf., Hall, supra note 105, at 406-07.
109. Constitutional commissions have been used regularly around the world, both for recommendations on national and subnational, or state, constitutions. Professor Christian Starck of the University of Göttingen, Germany, himself a consultant to the commission that recommended the new 1994 Land (state) constitution for Mecklenburg-Western Pomerania to the Land Assembly, has recently written about the process there and in other former East German Länder which have adopted new state constitutions. See CHRISTIAN STARCK, THE CONSTITUTIONS OF THE NEW GERMAN LÄNDER AND THEIR ORIGINS: A COMPARATIVE ANALYSIS (Konrad Adenaur Foundation Occasional Papers, June 1995). He made the following observation about the commission:

A commission differs from a committee, which is a suborgan of the Land assembly. The constitutional commission of Mecklenburg-Western Pomerania was similar to a Royal commission in the UK. The essential
and understanding of this much ignored, but increasingly important mechanism of state constitutional change.

reason for establishing such a commission was that the people’s movement and other groups, active in expelling the communist party dictatorship, failed to get seats in the Assembly, but deserved representation in the constitutional commission. In fact, they got 3 seats in the commission, one for the people’s movement, one for the Greens and one for a representative of a former regional constitution drafting commission, which had produced a draft of a Land constitution in a first version and later in a revised one . . .

The deliberations of the constitutional commission had begun in January 1991 with broad declarations by members about their ideas on how to construct a Land constitution. Then hearings of important social, political and economic associations had taken place. The associations commented particularly on the draft of the prior regional commission. This draft did not seem suitable to the majority of the constitutional commission as a basis for the deliberations. On demand of the president of the Land Assembly Professor von Mutius and the author were charged with preparing a draft of the organisational part of the constitution as basis for the discussion in the commission. We shared in preparing the text, coordinated and presented it to the commission. Our draft had been oriented towards the new Constitution of the Land Schleswig-Holstein and the Constitution of Lower Saxony.

Id. at 11.